BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

REPORT OF OPINION OF THE COURT OF APPEALS OF MARYLAND.

The opinion and decision of the Court of Appeals of Maryland involved in this cause is reported in 23 Atlantic Reporter, Second Series, page 677, and also appears in the record at pages 272 to 277.

II.

JURISDICTION.

1. Jurisdiction of this Honorable Court is invoked under Section 237 (b) of the *Judicial Code* as amended by the Act of February 13, 1925, ch. 229, Section 1; 43 Stat. 937; Section 344 of Title 28 U. S. C. A.

2. The judgment of the Court of Appeals of Maryland, which affirmed the decree of the trial court, was entered on February 9, 1942 (R. 277).

3. A final judgment or decree has been rendered by the highest court of the State of Maryland wherein a right or privilege was specially set up or claimed by the Petitioners under the Fourteenth Amendment to the Constitution of the United States, and such judgment or decree erroneously denied to the Petitioners such a right or privilege (R. 275-277).

Fleming v. Fleming, 264 U. S. 29, 31;
Tidal Oil Co. v. Flanagan, 263 U. S. 444;
Godchaux Co. v. Estopinal, 251 U. S. 179.

4. One of the grounds of the Petitioners' complaint in the Circuit Court No. 2 of Baltimore City (R. 258-262) and

one of the errors relied upon in the Court of Appeals of Maryland (R. 276) was that the judgment or decree rendered by the Circuit Court No. 2 of Baltimore City deprived the Petitioners and each of them of their and each of their property without due process of law (R. 276) And a second and a third subsidiary ground were that such judgment and decree appropriated and subjected the property of the defendants and of each of them to a use and enjoyment of that property which (a) was without license, or right by contract, title or interest and (b) constituted an unlawful interference with the safe, free and unobstructed carriage of freight and passengers in interstate commerce (R. 276).

By affirming the judgment or decree of the Circuit Court No. 2 of Baltimore City, the Court of Appeals of Maryland decided that this decree or judgment did not deprive the Petitioners of their property without due process of law within the meaning and protection of the Fourteenth Amendment to the Constitution of the United States.

There were two appeals in this cause. The chancellor first decreed on the proof that the fee simple title to the railroad property was in the Railroad, and dismissed the Oil Company's bill of complaint (R. 240). On this appeal, the Federal question did not arise. The appellate court, reversed the decree and remanded the cause to the Circuit Court No. 2 of Baltimore City for a decree to be passed by that tribunal in accordance with the views expressed in the opinion (R. 256). Hence this mandate was not a final appeal. When the Oil Company presented the form of a decree the Petitioners here objected to it as not being in conformity with the decision and as being in violation of the terms of the Fourteenth Amendment (R. 258-262).

The chancellor overruled these objections and the Petitioners appealed and, therefore, there was no final decree of a court of final jurisdiction for review on a writ of certiorari until the decree or judgment of the Court of Appeals affirming the decree of the chancellor (R. 275).

5. It is submitted that the jurisdiction of this Honorable Court to review this case by certiorari is sustained by the principle enforced in *Missouri Pacific Railway Company v. State of Nebraska ex rel. Board of Transportation of the State of Nebraska,* 164 U. S. 404, 417, 41 L. Ed., 489, 495, where it is said:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States".
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> *Chicago, etc., R. Co. v. United States,* 284 U. S. 80, 96, 97, 76, L. Ed. 177, 186.

The decision in *Erie Railroad Company v. Tompkins,* 304 U. S., 64, 82 L. ed. 1188, it is respectfully submitted, is not in conflict with this principle, and, on the facts is not here applicable. By that decision the doctrine of *Swift v. Tyson,* 16 Pet. 1, 10 L. ed. 865, was overruled and it was held that the substantive rule of law, prevailing in courts of the state in which the cause of action arose should be enforced in Federal courts, whether the rule be local or general in its nature or be a part of commercial law or of the law of torts. Nevertheless, the justiciable matters which are governed by the Constitution of the United States, its treaties and the federal statutes remain unaffected and abide with the federal judiciary (Federal Judiciary Act of September 24, 1789, chap. 20, sec. 34; 28 U. S. C. A. sec. 725, pp. 78, 79, 80).

The Federal constitutional question in issue was presented, argued and considered in the Court of Appeals of Maryland in the instant case (R. 276). And, so, the decision of *Erie Railroad Company v. Tompkins, supra,* is not here in point. The doctrine of that decision that the state decisions in which the cause of action arose are to govern in Federal Courts is confined to those cases in which non-federal issues are before the Federal courts for adjudication. 114 *A. L. R.* 1500; 54 *Harvard Law Review,* 1380.

Even in those instances where the construction of a state statute or a decision of the general law prevailing in a state is made by a court of last resort of that state, a Federal court is not thereby concluded when the question presented is a Federal issue in respect of whether a party is thereby deprived of rights secured by the Federal Constitution. Form gives way to substance and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state. *Hanover Fire Insurance Company v. Carr,* 272 U. S., 494, 509, 510; 71 L. ed. 372, 380. *Truax v. Corrigan,* 257 U. S. 312, 66 L. ed. 254. *St. Louis Cotton Compress Co. v. Arkansas,* 260 U. S. 346, 67 L. ed. 297.

In the determination whether there is an infringement of the Federal Constitution, the prerogative of a review and independent judgment in so grave and fundamental a matter is not lost to the Federal court by the decision of a state court. The prerogative is and must be retained for the declaration, preservation and enforcement of the guaranties under the Fourteenth Amendment to the Federal Constitution whenever the exigency arises.

III.

STATEMENT OF THE CASE.

PLEADING AND PROCEDURE.

The Richfield Oil Corporation of New York, respondent, brought on November 29, 1940, in the Circuit Court No. 2 of Baltimore City, a suit in equity against the Petitioners, the Chesapeake and Curtis Bay Railroad Company and The Western Maryland Railway Company, asking for a temporary and permanent injunction against the Petitioners, and for general relief (R. 1-19).

The theory upon which the bill was drawn was that the Richfield Oil Corporation of New York had acquired on October 6, 1939, by grant, a fee simple title to land over which the petitioners operated their railroad and that by virtue of such fee simple title the Respondent had the right to install a certain pipe line in such a manner as would not interfere with or interrupt the reasonable and proper use by the Respondents of their easement or right of way for railroad purposes or unreasonably interfere with the operation or maintenance of said railroad tracks or right of way or the operation of any trains, engines or cars over the same. The bill of complaint further alleged that in the exercise of this right the Respondent, on or about November 2, 1940, entered upon the premises of the Petitioners and placed certain sleeves and pipes necessary for the transportation of its petroleum products from one part of its property and under the tracks and rights of way of the Petitioners to other locations on the Respondent's property. This installation was made south of a public highway through Respondent's property, known as Northbridge Avenue or as it appears on the plats variously as "North Avenue" and "Wagner Point Road" (R. 2, 3, 4, Plats—R. 10A, 34A, 36A, 55).

While the Respondent was in the course of this installation, the bill of complaint charges that the Petitioners caused their agents and servants to trespass on Respondent's property and, notwithstanding Respondent's resistance to succeed in partly destroying the sleeves and pipes (R. 4). The attempt and its resistance were the occasion for the filing of the bill of complaint, and the seeking of relief by way of a temporary and permanent injunction (R. 6).

The specific relief prayed was:

> "(a) That the Defendants, they and each of them, their agents and servants, may be permanently enjoined and strictly prohibited from interfering, obstructing, or molesting the Complainant, its agents and servants, in crossing or recrossing over, or in placing its pipe lines, connections, or other equipment necessary and proper to the operation and enjoyment of Complainant's property hereinabove described, across and under the right of way of Defendants located on the Complainant's said property provided, however, that the same be performed by the Complainant in such manner as not to interfere with or interrupt the reasonable and proper use by the Defendants of said right of way for railroad purposes.
>
> (b) That pending the determination of this cause on its merits, a preliminary injunction may be granted against the Defendants, restraining them and each of them, their agents and servants, from interfering with or obstructing the Complainant in the use of its said property as fully, and to the same extent and under the same conditions as above set forth in paragraph (a).
>
> (c) That your Complainant may have such other and further relief as the nature of its case may require." (R. 6).

The Petitioners answered jointly and severally (R. 19). The titles of the Respondent and these Petitioners and the grants under which they held were carefully set forth and supported by the documents of title (R. 20, 23-27; 34, 34A (plat) 35, 36, 36A (plat) 37-46) and by correspondence of 1926, between J. Cookman Boyd, Esq., General Counsel of the United States Asphalt Refining Company and officials of the Petitioners (R. 28-29, 29-31, 47-52, 53-54, 137, 210, 211). The Petitioners set forth in their answer that previous installations had been by permission, and that the Oil Corporation had no right to make the proposed installation because the grant to the Chesapeake and Curtis Bay Railroad Company of the land described was not of a right of way but in fee, and, further, that, if it were a right of way, there was no reversion of the land granted to the Chesapeake and Curtis Bay Railroad Company, as such land was excluded in terms from the grants under which the Richfield Oil Corporation claimed title. And, finally, even if the grants to the Railroad Company were merely of a right of way for railroad purposes the Chesapeake and Curtis Bay Railroad Company is entitled to the exclusive use and possession of said land, with the right to exclude the Richfield Oil Corporation and all others from entering thereon and laying pipes thereunder (R. 22, 23, 27, 32, 33).

No preliminary injunction was granted, the parties took testimony and the cause was submitted. The Chancellor decreed that the Chesapeake and Curtis Bay Railroad Company is the owner in fee simple of the property located at Wagner's Point in Baltimore City, State of Maryland, and more particularly described in a deed dated September 11, 1925, between The United States Asphalt Refining Company and The Chesapeake and Curtis Bay Railroad Company. The bill of complaint was dismissed (R. 239-240).

The Richfield Oil Corporation took an appeal from this decree to the Court of Appeals of Maryland, which reversed the decree and remanded the case to the Circuit Court No. 2 of Baltimore City for the passage of a decree in accordance with the views expressed in the opinion filed (R. 243-256).

FIRST OPINION OF APPELLATE COURT AND SUBSEQUENT PROCEDURE.

The views of the Appellate Court are stated by it in the opinion (first appeal) to be:

(a) The Chesapeake and Curtis Bay Railroad Company did not take a fee in the parcels of land conveyed to it by the United States Asphalt Refining Company in the deed of September 11, 1925, and, considering conflicting extrinsic testimony as to the intention of the parties at the time of the execution of this deed, construed the language of the deed, in connection with the extrinsic evidence to grant an easement of rights of way for railroad purposes to the Railroad Company, grantee (R. 250-251).

Later on in the opinion,—apparently in conflict with its earlier adoption of extrinsic testimony to ascertain the intention of the parties to a deed, when there is no suggestion of fraud or mistake,—the Court rejects the extrinsic evidence in aid of construction and correctly holds in these terms that "The rights of the parties are determined and measured by the terms of the deed, particularly as the appellant is a stranger to this deed." (R. 251-252) And, on the language of the deed, holds an easement, and not a fee, was conveyed (R. 253).

(b) The appellate court, also declared that the fee is in the Richfield Oil Corporation subject to the easements of

rights of way for railroad purposes in the Chesapeake and Curtis Bay Railroad Company, and in the Western Maryland Railway Company (R. 254).

(c) And, finally, the appellate court expressed its conclusion:

> "We find that the appellant, its agents and servants have the right of crossing or recrossing over, or in placing its pipe lines, connections or other equipment necessary and proper to the operation and enjoyment of appellant's property across and under the right of way of appellees located on the property owned by the appellant in fee provided, however, that this be performed by the appellant in such manner and at such times as not to interfere with or interrupt the reasonable and proper use by the appellees of said rights of way for railroad purposes."
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> *Richfield Oil Corporation of New York vs. The Chesapeake & Curtis Bay Railroad Company, et al.*, No. 38, April Term, 1941, filed June 10, 1941. 20 A. (2d) 581, 589 (R. 255).

Upon the filing of the opinion, the Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company prepared and filed in the Court of Appeals of Maryland a motion for re-argument, which was overruled.

On July 12, 1941, the opinion and mandate from the Court of Appeals of Maryland were received and filed in the Circuit Court No. 2 of Baltimore City. By this mandate the Chancellor was directed and authorized to render a decree in accordance with the views expressed by the Court of Appeals in its opinion in the case (R. 256).

DECREE OF TRIAL COURT AFTER FIRST APPEAL.

Whereupon the Richfield Oil Corporation presented to the Circuit Court No. 2 of Baltimore City a form of decree, which provided:

"1. That The Chesapeake & Curtis Bay Railroad Company is the owner of an easement of the rights of way for railroad purposes, more particularly described in a deed dated September 11th, 1925, between the United States Asphalt Refining Company and The Chesapeake and Curtis Bay Railroad Company and recorded among the Land Records of Baltimore City in Liber S. C. L., No. 4465, folio 321, and that Richfield Oil Corporation of New York is the owner of the fee underlying the rights of way described in said deed dated September 11, 1925.

2. That it is further ORDERED, ADJUDGED, and DECREED that Richfield Oil Corporation of New York, its agents and servants have the right of crossing or recrossing over, or in placing its pipe lines, connections or other equipment necessary and proper to the operation and enjoyment of its property across and under the rights of way of defendants located on the property owned by Richfield Oil Corporation of New York in fee, and that the defendants herein The Chesapeake & Curtis Bay Railroad Company and Western Maryland Railway Company, they and each of them, their agents and servants, be and they are hereby permanently enjoined and strictly prohibited from interfering with, obstructing or molesting Richfield Oil Corporation of New York, its agents and servants, in crossing or recrossing over, or in placing its pipe lines, connections, or other equipment necessary and proper to the operation and enjoyment of its property across and under the rights of way of defendant, The Chesapeake & Curtis Bay Railroad Company, located on said property of Richfield Oil Corporation of New York, provided, however, that the same be performed by Richfield Oil Corporation of New York, its agents and servants, in such manner and at such times as not to

interfere with or interrupt the reasonable and proper use by the defendants of said rights of way for railroad purposes" (R. 259-261).

The Petitioners objected to the passage and filing of said decree (R. 261, 262).

After a hearing before the Court, the objections to the proposed decree were rejected and the decree as signed was passed and filed (R. 262, 270).

SECOND APPEAL.

The defendants excepted to this action and an appeal from the decree of the Circuit Court No. 2 of Baltimore City, dated the fifteenth of July, 1941, was taken by the defendants on August 22, 1941 (R. 242), and on this appeal the appellants presented two grounds. The first was that the only issue at the trial of the cause was whether the Richfield Oil Corporation had the right to lay an underground pipe line at the proposed place near Northbridge Avenue, and that the form of the decree was general, instead of particular, and, therefore, bad since the general terms of the relief may embrace, but not enlarge, the relief warranted by the averment of facts made in the charging part of the bill of complaint.

The second ground urged was that there can be no concurrent use or occupancy of the right of way of a railroad while in actual use by the carrier in the operation of its enterprise unless with its authorized consent. It would be the taking of private property without the owner's consent for the private use of another, which is not due process of law, but which is a violation of the Fourteenth Amendment to the Constitution of the United States (R. 276).

The Court of Appeals of Maryland on January 13, 1942, affirmed the second decree of the Circuit Court No. 2 of Baltimore City, stating:

> "It is, therefore, unmistakable that the issue raised by the bill and answer was whether the oil corporation had the right to cross and recross over, or to place its pipe lines across and under, the railroad rights of way, not only at the specific spot where the trouble arose, but at any proper place in the described tract of land" (R. 274).
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> *Chesapeake and Curtis Bay Railroad Company, et al., v. Richfield Oil Corporation of New York*, No. 73, October Term, 1941, decided January 13, 1942. 23 A. (2d) pp. 677-679 (R. 272).

While the Court of Appeals did not mention in its opinion (second appeal) the constitutional questions presented (R. 272-275), they were considered and decided, as appears from the certificate of the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland (R. 276).

Title 28, U. S. C. A., sec. 344, n. 49, n. 50.

IV.

SPECIFICATIONS OF ERROR.

1. The Court of Appeals of Maryland erred in finding and holding that the Richfield Oil Corporation is the owner in fee simple of that portion of the land upon which the Railroad Companies operate their railroad under grant from The United States Asphalt Refining Company to The Chesapeake and Curtis Bay Railroad Company, bearing date of September 11th, 1925, and that in so holding and deciding the Railroad Companies were and are deprived of their property without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States.

2. The Court of Appeals of Maryland erred in refusing to find and to hold in the instant case that the rule of real property, which before and at the time of the conveyance on September 11, 1925, by The United States Asphalt Refining Company to The Chesapeake and Curtis Bay Railroad Company of certain real property for use for railroad purposes, and thereafter continuously until the decree in the instant case, was that the possession and enjoyment of the real property in use for railroad purposes was exclusive, and in so refusing and so finding and holding The Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railroad Company were and are thereby deprived of their property rights without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

3. The Court of Appeals of Maryland erred in finding and holding that the use on or below the surface of the Railroad Companies' real property by the Richfield Oil Corporation for the purpose of crossing this property in use for railroad purposes at its pleasure and when and where and how it chooses, by laying and constructing oil pipe lines for the carriage and delivery between separate portions of the Oil Corporation's land, of its crude and refined oil or other products, is not a taking of the property of the Railroad Companies without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

4. The Court of Appeals of Maryland erred in finding and holding that the Richfield Oil Corporation is the owner in fee simple of that portion of land, upon which the Railroad Companies operate their railroad through and separating the premises of the Richfield Oil Corporation, and that, subject to such railroad uses, the Richfield Oil Cor-

poration may, at its pleasure, lay and construct for its industrial purposes or otherwise, upon, over and under the surface, oil pipe lines across the land occupied for and devoted to the uses of the Railroad Companies; and that in so finding and holding the Railroad Companies were deprived of their property without due process of law and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

5. That in finding and holding that the Richfield Oil Corporation is the owner in fee simple of that portion of land upon which the Railroad Companies operate their railroad through the premises of the Richfield Oil Corporation, and that, subject to such railroad uses, the Richfield Oil Corporation may, at its pleasure and convenience, enter upon and lay and construct for its industrial purposes or otherwise, upon, over or under the surface, oil pipe lines across the land occupied for and devoted to the uses of the Railroad Companies, the decree of the Court of Appeals of Maryland is in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States and does, and will, authorize and permit an improper and unlawful interference with interstate commerce, and will obstruct, hinder, interfere, delay and prevent the said Railroad Companies and each of them, in the safe, free and unobstructed carriage of passengers and freight, and the operation of its railways while engaged in interstate commerce.

V.

ARGUMENT.

THE QUESTIONED TITLE OF RICHFIELD OIL CORPORATION.

The Court of Appeals decided three issues:

First. It decided that the deed of the United States Asphalt Refining Company to the Chesapeake and Curtis Bay Railroad Company under date of September 11, 1925,

did not convey in fee simple the nine parcels of land in said deed separately and fully described (R. 11-19, 55), but that said nine parcels of land were granted to the Chesapeake and Curtis Bay Railroad Company so long as the said nine parcels of land were used for railroad purposes. The effect of this construction was to leave in the United States Asphalt Refining Company a reversionary interest when the nine parcels should cease to be used for railroad purposes by the said Railroad Company and its successors and assignee.

In reaching this result the court permitted itself to approve the admission of extrinsic testimony to be received and considered in determining the intention of the parties with reference to the quantum of the estate conveyed. What was said in reference to the admissibility of this extrinsic testimony in respect of the intention of the parties to the deed must be taken as *dicta*. The court, finally, construed the instrument from its terms, and so no anomalous doctrine may be said to have been adopted (R. 251-252).

No constitutional question is made on this construction.

Second. The effect of this grant to the Railroad Company, its successors and assign, of an estate or interest less than one in fee simple in the nine described parcels of land by the owner in severalty in fee simple, left that owner with two estates, namely, an estate in fee simple, in all its land, with the exception of nine parcels carved therefrom in which it had a reversionary interest or estate, which could not vest in possession and enjoyment so long as the parcels should continue to be used for the railroad purposes of their grantee, its successors and assigns. Thus an estate in severalty became divided into three separate and legally distinct estates and interests of a different nature, that is, the Asphalt Refining Company had an es-

tate *in fee simple and in severalty* in all its land, with the exception of the nine lots of land granted to the Railroad Company for its railroad uses and purposes. In these nine described lots there were two estates or interests: (first) that of the grantee, which was the right or interest of possession, user, and enjoyment of those nine parcels of land by the said Railroad Company, its successors and assigns, so long as the said Railroad Company, its successors and assigns, should use said lots for its railroad purposes; and (second) that of the grantor, which was the right of reverter to the grantor, its successors and assigns, should the Railroad Company cease to use said property for railroad purposes. *Tiffany on Real Property* (2nd ed.) secs. 93, 132; *Reed v. Stouffer*, 56 Md. 236; *First Universalist Soc. v. Boland*, 155 Mass. 171, 29 N. E. 524; *Board of Chosen Freeholders v. Buck*, 79 N. J. Eq. 472; 82 Atl. 418; *Leonard v. Burr*, 18 N. Y. 96; *Slegal v. Lauer*, 148 Pa. St. 236, 23 Atl. 996; *Gray*, Perpetuities, secs. 31-40. The interest so acquired has been variously called an easement, a base qualified or determinable fee, and a servitude, but its important and distinguishing quality is the right conferred of immediate and continuous possession and enjoyment. The nature and extent of that user will be presently considered.

The question for immediate discussion on this brief is whether the reversionary interest of the Asphalt Refining Company has been granted or assigned.

The reversionary interest of the Asphalt Refining Company arose on September 11, 1925 (R. 11). At no time has the Asphalt Refining Company in terms conveyed this reversionary interest. Its only later deed of record is the one to the Interocean Oil Company of Delaware bearing date October 5, 1925 (R. 38-39). It is submitted, that there is no grant in that deed of such reversionary interest, nor any words which, by necessary inference, are suffi-

cient to establish an intention of the granter to convey this reversionary interest, which could never ripen into possession and immediate enjoyment except upon the remote possibility of the cessation of railway user of the nine parcels of land by the Chesapeake and Curtis Bay Railroad Company, its successors and assigns. The language of the deed prevents such a construction.

The granting clause conveyed in fee simple, four contiguous parcels of land, which are described, and contain in the aggregate about 107.72 acres. This reservation is then made:

> "Saving and excepting, however, from the above described land such portions as is (*sic*) described and conveyed to the Chesapeake and Curtis Bay Railroad Company by and in a deed of exchange and in the annexed hereto" (plat thereto) "made between the said United States Asphalt Refining Company and the Chesapeake and Curtis Bay Railroad Company, dated September 11, 1925" (R. 38-39; 11-19, 55).

Plainly and unequivocally from the conveyance of the four parcels of described land there is a reservation of certain "land". No doubt is left as to the land saved and excepted. It is "such portions" of the land "described and conveyed" in a specified deed to the Chesapeake and Curtis Bay Railroad Company of September 11th, 1925. In that deed, the only portions of land so conveyed are the nine parcels of land separately and completely bounded and described in that deed. Consequently, these are the portions of land saved and excepted from the grant to the Interocean Oil Company. What the grantor specifically excepted from the grant may not be held by judicial interpolation to be embraced. The express provision precludes implication. To decide what is specifically excluded to be included is to defeat intention by an arbitrary fiat.

Furthermore, the granting clause of the deed in question is of the four lots described *"in fee simple"*, saving and excepting therefrom such portions of these four lots as are described in the deed to the Railroad Company (R. 38). In the habendum clause the grantee, its successors and assigns, are to have and to hold the land intended to be conveyed *"in fee simple"* (R. 39). The United States Asphalt Refining Company did not hold at the time of this conveyance to the Interocean Oil Company, an estate "in fee simple", in the nine parcels of land described and conveyed in the deed of the Refining Company to the Railroad Company. As has been seen the Refining Company held only a reversionary interest in the nine parcels. It could not convey a fee simple estate when its interest mounted to nothing more than a reversionary interest or contingent right of re-entry.

It is submitted that the error of the appellate court is in defining "portions" to refer to an *incorporeal* right instead of "the above described land", a *corporeal hereditament* (R. 253-54).

No matter from what angle it be considered, the deed speaks clearly to the conclusion that the reversionary interest of the Refining Company in the nine parcels of land mentioned in the deed to the Railroad is excepted from the conveyance to the Interocean Oil Company (R. 38-39), and, therefore, neither it nor its successor in estate, the Richfield Oil Corporation, has any interest, title or estate in the reversion of the land or railroad premises now held by the Petitioners.

The reversionary interest in the land now used and possessed by the Petitioners for their railway purposes and enjoyment is in the United States Asphalt Company. The bestowal of this interest by decree of the Court of Appeals

of Maryland upon the Richfield Oil Corporation is in substance and effect an arbitrary and capricious act which affords no basis for a decree of that court which authorizes the Richfield Oil Corporation to enter upon and use the property of the Petitioners for the Oil Corporation's private business purposes. The result is an appropriation of the Respondent's property in violation of the guaranties of the Fourteenth Amendment to the Constitution of the United States.

It is respectfully urged that it becomes the duty of the United States Supreme Court to review and correct the error of a state court in resting its decision denying asserted federal rights upon a basis of fact or of construction which has no support in the record.

Railroad Commission v. Eastern Texas R. Co., 264 U. S. 79, 86-87, 68 L. ed. 569, 573,
Postal Telegraph-Cable Co. v. City of Newport, 247 U. S. 464, 62 L. ed. 1215,
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 394, 69 L. ed. 343, 347,
Director Gen. of R. R. v. Wechsler, 263 U. S. 22, 24, 68 L. ed. 143, 146,
Ward v. Board of County Commissioners, 253 U. S. 17, 22, 25, 64 L. ed. 754,
Hanover etc. Co. v. Carr, 272 U. S. 494, 509, 71 L. ed. 373, 380.

Third. If it be conceded that as the successor in title of the United States Asphalt Refining Company, the Richfield Oil Corporation is the owner of the reversionary interest in the land occupied by the Respondents under a grant for railway use and enjoyment, the decree of the state court is none the less in violation of the guaranties afforded by the Fourteenth Amendment to the Constitution of the United States. The basis for this position is (a) the nature and scope of the property rights of the Petitioners under

the grant to the Chesapeake and Curtis Bay Railway Company (R. 11-19) and (b) the confiscatory effect on these property rights by the decree.

THE RIGHT IN MARYLAND OF A RAILWAY CARRIER TO THE EXCLUSIVE POSSESSION AND ENJOYMENT OF ITS USED RAILWAY PREMISES.

1. In Maryland the law which subsists at the time and place of making a contract enters into and forms a part of it, as if it were expressly referred to or incorporated in the contractual terms; and this rule embraces alike those which affect its validity, construction, discharge and enforcement.

Slicing Machine Company v. Murphy, 161 Md. 667, 671, 672;

Williston on Contracts (Rev'd ed.), Sec. 615 and the parties to a deed are affected with this knowledge.

Brehm v. State Roads Commission, 176 Md. 411, 422.

2. At the time of its incorporation and its acquisition of its railroad site from the United States Asphalt Refining Company, the Chesapeake and Curtis Bay Railroad Company was authorized and empowered to construct, maintain and operate a railroad not exceeding 100 feet in width at the graded surface with the necessary additions for cuts and fills, and with as many tracks as it may deem necessary, and of an additional width for necessary side tracks, turnouts, depots, buildings and other works.

Annotated Code of Maryland (1924) title "*Corporations*", Art. 23, Sec. 207, Vol. 1, p. 743; *Idem.* (1939) Art. 23, Sec. 210, Vol. 1, p. 879.

3. Under Maryland law the railroad company was *at the time of the acquisition* of its right of way and real prop-

erty, and *continuously* until the decree in the instant case entitled to the exclusive possession of the said portion of its right of way and other real property.

The grant of this right of way to The Chesapeake and Curtis Bay Railroad Company for railway purposes vested in the grantee, its successors and assigns, so long as it continued to be used for railway purposes, an exclusive possession and enjoyment of the interest in the land granted. And this is true whether the interest in the land granted is called an "easement" or a base, qualified or determinable fee or a right of way.

It has long been settled law that a railway carrier is so largely engaged in the public service that it has acquired the status of a public instrumentality. It partakes of the sovereignty of the State in the exercise of the power of eminent domain to acquire its necessary estates in land from the private owner, who becomes a trespasser if he goes upon the carrier's right of way other than at a public crossing or at an agreed or reserved private crossing. On its right of way the carrier may place not only its tracks, and its other equipment for the movement, repair and housing of the rolling stock and accessories, but also its permanent structures, such as round-houses, signal system, passenger or freight station or railway hotel. The surface of the right of way may be raised to any height or lowered to any level. Over its railway and its land granted for railroad purposes, it of right transports, in either direction, its freight, express, mail and passengers at all times, whether by day or night, at any hour, minute or second.

It is of the nature of its public service, and inherent in the discharge of its functions, that the carrier have complete control and direction of its railway operations. The security and protection of its traffic, the regularity and certainty of departure, arrival and delivery in transporta-

tion, the safety of its servants and agents, as well as that of its licensees and passengers, and the fulfilment of its hazardous enterprises in the public interest are best met and assured by complete dominion and control of the carrier. No court has more steadfastly recognized and enforced this fundamental right of the carrier to exclusive control than the Court of Appeals of Maryland.

Hamilton v. Railroad Co., 1 Md. 567, 568;
State v. Railroad Co., 48 Md. 49;
Annapolis, etc., R. Co. v. Pumphrey, 72 Md. 82, 86;
State v. B. & O. R. R. Co., 69 Md. 494, 497;
B. & O. R. R. v. State, use of Allison, 62 Md. 479, 487;
Jackson v. Penna. R. Co., 176 Md. 6;
Am. Tel. & Tel. Co. v. Pearce, 71 Md. 535, 542, 544;
B. & P. R. R. Co. v. Magruder, 34 Md. 79;
State, use of Ricketts, v. B. & O. R. R. Co., 69 Md. 494.

The rule of exclusion also applies to its longitudinal surface.

It has been held in *Sapp v. Northern Central Railway Co.*, 51 Md. 115, at page 125, that a railroad corporation has no power or right to grant an easement of a footway for persons to walk along or by the side of their tracks. There can be no prescriptive right or presumption of such a grant, though the appellants and others, owning houses along the line of the appellee's railroad, for twenty-five years, had used a private footway, for some considerable distance over the lands of the appellee, alongside of, or between the tracks of the road, from the houses to a public highway.

Accord:

Libertini v. Schroeder, 149 Md. 484, 489, 495.

The rule of exclusion is enforced against a use *beneath* the surface of its railway. An authorized construction of a municipal sewer under a railway right of way can, if not assented to by the railway Company, only be made by the exercise of the power of eminent domain by the municipality and the payment of adequate compensation by the municipality to the owner of the railway right of way.

Baltimore City v. Cowen, 88 Md. 447, 451, 452, 453-456;
Central Ry. Co. v. Phila., etc., R. Co., 95 Md. 429, 438, 439-442;
Baltimore and Ohio R. Co. v. Baltimore, 94 Md. 535, 537;
United Railways & Electric Co. v. State Roads Commission, 123 Md. 561, 588;
Dobler v. Baltimore, 151 Md. 154, 162.

The crossing by one railroad corporation of another railroad or turnpike road is a taking of property for which compensation must be paid.

Baltimore & Havre de Grace Turnpike Co. v. Union Railway Co., 35 Md. 224, 230;
Northern Central Railway Co. v. Baltimore, 46 Md. 425-9, 452;
Central Ry. Co. v. Philadelphia Co., supra;
North Baltimore, etc., Ry. Co. v. North Ave. Ry. Co., 75 Md. 233, 242, 245;
Baltimore & Ohio Ry. Co. v. Baltimore City, 98 Md. 535;

See:

Water Co. v. Baltimore County, 105 Md. 154, 162.
Am. Tel. & Tel. Co. v. Pearce, 71 Md. 535, 542-552.

The Deed under which the Railroad Companies, Petitioners herein, acquired their rights and interests in the lands in question was executed and delivered at a time

when the doctrine above referred to was the established law of the State of Maryland. The instant decision and decree of the Court of Appeals of the State of Maryland which for the first time holds that a right of way for railroad purposes is not an exclusive right of way, therefore, clearly impairs the rights granted and conveyed by said deeds to The Chesapeake & Curtis Bay Railroad Company and thereby deprives the Railroad Companies of their property without due process of law contrary to the Fourteenth Amendment.

Muhlker vs. New York and Harlem Railroad Company, 197 U. S. 544.

See also:

Great Northern Railroad Company vs. Sunburst Oil and Refining Co., 287 U. S. 358, 362.

In the cases cited, the doctrine of the exclusive right of the railway company to its used premises for railway purposes has been consistently and uniformly enforced heretofore in Maryland, and is in accord with the decisions in the Supreme Court of the United States.

NO CONFLICT WITH THE FEDERAL RULE.

In like manner, it has been held to be in violation of constitutional guaranties and an unauthorized appropriation of railway property and so an unauthorized taking within the constitutional prohibitions for a grain elevator (a), a levee improvement (b) for a telegraph line (c) or for a public hack stand to occupy the railroad premises without the consent of the railroad company.

(a) *Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 405, 417 L. ed. 489, 494, 495.

(b) *Missouri, etc. R. Co. v. Rockwell County Levee Improvement District* (Tex.), 297 S. W. 206.

(c) *Louisville, etc. R. Co. v. Western Union Tel. Co.*, 250 U. S. 363, 63 L. ed. 1032.
Western Union Tel. Co. v. Louisville R. Co., 270 Ill. 399, 110 N. E. 583.
Western Union Tel. Co. v. Pennsylvania R. Co., 105 U. S. 164.
(d) *Delaware, etc. R. Co. v. Town of Morristown*, 276 U. S. 182, 72 L. ed. 523.

Similarly, a state highway commission's order directing a pipe line company transporting natural gas in both interstate and intrastate commerce to remove, lower or incase pipe and telephone lines where new highways would cross company's right of way would take private property for public use and a state statute construed as authorizing commission's order without compensation to company denied due process of law.

Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613, 79 L. ed. 1090; 295 U. S. 768 79 L. ed. 1709.
Calor Oil, etc., Co. v. Withers, 141 Ky. 489, 133 S. W. 210.

And in *Chicago, etc., Co. v. August E. Holmbert*, 282 U. S. 162-167, 75 L. ed. 270, it was held an order of the state railroad Commission requiring the construction, at the expense of a railroad company and the landowner, of an underpass connecting farm lands on both sides of the railroad tracks, solely for the convenience and benefit of the landowner in the use of his own property, and not because an existing surface crossing is dangerous to life or property, is invalid as taking property without due process of law.

Thus it appears that the law so announced and so long consistently enforced in Maryland is in accordance with the decisions of this learned tribunal. There is, it is sub-

mitted, no conflict with the position here maintained by the decision in *Great Northern Ry. Co. v. United States*, No. 149, argued on January 13, 1942, and decided February 2, 1942, and reported at page 529 of the Advance Sheets of the Supreme Court Reporter, 62 L. ed. No. 7. In that case the court determined that on a right of way granted to a Railroad by the United States through public lands, the grantee did not hold a fee and that it was *not a railway use* by the Railway Company for it to drill and remove oil and minerals underlying the right of way.

THE VIOLATION OF PROPERTY RIGHTS OF THE RAILROADS.

The right of way of the Petitioners is property. *Baltimore City v. Cowen*, 88 Md. 451, 452, 453. *Panhandle, etc., Co. v. State Highway Com.*, 294 U. S. 613, 618, 79 L. ed. 1091, 1095. And it is clear the decree provides for an actual invasion of the Petitioners' property rights on the surface and underground to the damage of the railway property rights.

> *Central Coal Co. vs. Georges Creek Coal Co.*, 37 Md. 537, 559.

All pipe lines or other crossings on the surface will occupy that much of the surface either to the exclusion of other tracks or necessitating changes in the surface conditions which would permit the safe use of the surface by both the railway tracks and equipment and the pipe lines of the Oil Corporation. In the surface construction there are two elements of damages. The *first* is the cost of the construction and of the maintenance of the new servitude, including the changes made necessary by the installation of a pipe line or crossing through which would flow a dangerous, combustible fluid.

> *Central Ry. Co. v. P. W. & B. R. Co.*, 95 Md. 442.

If the crossing by pipe line or other conduit is made under the surface, the passage has to be made by excavation across or through the right of way or yards or other premises of the Petitioners by trench or other methods to be followed by the installation of the line of pipes; restoration of the surface conditions, and the future safeguarding of the tracks in uniform level and gauge against the subsidence of the fill along the line of the transverse excavation. The primary obligation of keeping the roadbed in proper condition and the track safe would be enlarged so that in cost of maintenance and in added risk of responsibility and liability for loss and injury to their patrons and users the financial burdens of the carriers would be augmented.

The *second* element of damages is the value of the railroad property of the Petitioners, which may be impaired or appropriated by the installation.

> *Central Ry. Co. v. P. W. & B. R. Co.*, 95 Md. 442.
> *Baltimore & Ohio R. Co. v. Baltimore*, 98 Md. 535, 537, 538.

It may be contended that damages to cover the cost of maintenance and the depreciation in value of the Railroad property are too remote, indefinite and speculative. In reply to a similar argument it was said in the last cited case "But the mere fact that the amount cannot be fixed by proof with precision and certainty ought not to deprive a person of such redress as may be possible." pp. 539, 540. The record shows that the Oil Company's plans are not completed with respect to the installation of underground pipe lines across the Petitioner's premises. Other additional water pipe and oil lines are planned (R. 86, 97). The record also shows that other lines had been placed

without permission from any one nor did the Manager of the Richfield Oil Corporation confer with any one as to the time, location or manner in which they were to be placed (R. 80-83, 94, 155). The particular installation which gave rise to the present controversy was of eight-inch pipe, about 40 feet long, and incased in twelve-inch steel "sleeves". (R. 82). In response to a question whether the installation of the additional pipe line crossings or surface crossings with the proper operation and maintenance of the railroad or its right of way (R. 71), the former Superintendent and Receiver of the Interocean Oil Company testified:

> "That if such things are done it would be necessary to do them with the cooperation of the local railroad officials so that the thing can be timed properly so that there won't be any destructive elements entering into the situation, such as a locomotive running over excavated areas, or things of that character. So that it seems with proper cooperation these things might be done." (R. 71-72 and 149, 150, 156).

The following case is pertinent.

In *Baltimore City v. Cowen* (1898), 88 Md. 447, the railroad company had acquired by adverse user of more than thirty-five years a right of way for its railway over a lot of land, and the municipality of Baltimore subsequently acquired by condemnation the right to open at grade a street across said railway right of way. It was decided the later construction by the city of a sewer along the street and under the tracks was not a consequential damage arising from a change in the grade of the street, but that the construction of the sewer was an actual invasion of the property rights of the company, *pp. 451, 452.* Speaking

with reference to the quality of the company's interest, the court declared:

> "If a mere right of way, it is no less property, for a right of way is the right held by the company in the land over which its road runs for railroad purposes." *p. 452.*

Accord.

> *DeLauder v. County Comm. of Balto. County* (1902), 94 Md. 1, 6-7.

PERILS OF THE JUDGMENT AT BAR.

Not only does the decree authorize an actual invasion of the used portion of the right of way of the railroad companies with resultant damages and loss, at a particular point, but everywhere on its premises according to the will and choice of the Oil Company. The vital necessity of undivided control of the railroad property is stripped from its owners, which are deprived of all control over their used railway property where, without their approval of the method of installation, of the quality and fitness of material used, and of the supervision of the work and no provision in respect of its maintenance or for compensation, beyond the barren and wholly inadequate provision subsequent that the installation be performed in such manner and at such times as not to interfere with or interrupt the reasonable and proper use by the defendants of said rights of way for "railroad purposes." And while its property is thus taken from its use, control and possession the defendants, their agents and servants are reduced to the servitude of "lookers on in Venice", as they are

> "permanently enjoined and strictly prohibited from interfering with, obstructing or molesting Richfield Oil Corporation of New York, its agents and servants, in crossing or recrossing over or in placing its pipe lines, connections or other equipment necessary and

proper to the operation and enjoyment of its property across and under the rights of way of the defendant." (R. 257-258, 271, 277).

Baltimore & Ohio R. R. v. Baltimore, 98 Md. 537, 538.

See:

Central Ry. Co. v. Phil. etc., Rwy. Co., 95 Md. 444, 445.

The perils and burdens of the uses authorized by this decree increase the gravity of the situation under this decree.

Baltimore & Ohio R. R. v. Baltimore, Supra.

In *New York, N. H. & H. R. Co. v. Armstrong,* 92 Conn. 349, 102 A. 791, it is said:

"The liability of a break in the pipes through an accident upon the railroad, or otherwise, and the danger that the inflammable oil would be ignited, with the consequent destruction of trestle and rolling stock upon it, impose upon the plaintiff an imperative private and public duty to keep these pipes from its location."

Accord:

The Canada S. R. Co. v. Niagara Falls (1892), 22 Ont. L. R. 41.

THE IMPORTANCE OF THIS CASE IN INTERSTATE COMMERCE.

The importance of this case lies in the fact that it not only affects the rights of user for railway purposes by the Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company of their property through the Oil Company's land but a new doctrine has been announced which affects real property occupied by public service corporations throughout the State of Maryland engaged in interstate commerce under numerous similar grants. The facts of this record, without repetition

at this point, give emphasis how greatly in point of danger, delay, interruption of transportation and travel, and increased expense of maintenance, operation and protective measures the regular course of interstate commerce will be retarded, burdened and prejudicially affected as a direct consequence of the adoption of the doctrine of the Court of Appeals in the instant case.

VI.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the Petitioners will not be deprived of rights guaranteed them by the Fourteenth Amendment, and that to such end a writ of certiorari should be granted in this case and this Court should review the decision of the Court of Appeals of Maryland and finally reverse it.

Respectfully submitted,

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